

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE:

B-220368

DATE:

January 23, 1986

MATTER OF:

G&L Oxygen and Medical Supply Services

DIGEST:

1. The publication of a procurement in the Commerce Business Daily (CBD) constitutes constructive notice of the solicitation and its contents even where the agency failed to send the protester a copy of the solicitation.
2. Where an announcement in the CBD dated August 13, 1985, contains an obvious typographical error, in which the supply of services from October 1, 1985, through September 30, 1985 (instead of September 30, 1986), is called for, the incumbent contractor should have known that its interests would be affected and accordingly the error did not deprive it of adequate notice.

G&L Oxygen and Medical Supply Services (G&L) protests the award of a contract for the provision of home oxygen therapy services to B-Mar Oxygen Services (B-Mar) under invitation for bids (IFB) No. 627-2-86 issued by the Veterans Administration (VA) Medical Center, Newington, Connecticut.

We dismiss the protest.

G&L had been the incumbent contractor based on a contract beginning September 26, 1983. A renewal clause in that contract provided as follows:

"At the option of the Government, the right is reserved to renew this contract by serving notice in writing thirty days prior to the termination date of the contract. The Government will limit the exercise of the option to two renewals and the maximum period of the contract through the exercise of options will be limited to three years."

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The basic contract was renewed for 1 year on September 26, 1984. G&L alleges that on August 1 and 7, 1985, it requested that the contract be renewed again, but no response was received from the VA.

On October 15, 1985, G&L was informed by the contracting officer that an award had been made to B-Mar. G&L protested here on October 18, 1985.

G&L contends that B-Mar is not a small business as is required by the solicitation and that the contracting officer failed to send G&L a solicitation and deliberately prevented G&L from participating in the competition.

The VA states that although G&L did request renewal of its contract, the contracting officer informed G&L that in view of deficiencies in G&L's performance, G&L's contract was in jeopardy. Moreover, G&L never requested a copy of the solicitation from the VA. Further, the VA points out that the renewal clause reserved to the government the right to renew the contract by serving notice 30 days prior to the termination date of the contract. Since the VA did not give such notice to G&L, the VA contends that as of July 30, 1985 (30 days prior to the August 30 termination date), G&L had notice that the VA was not renewing the contract.

The VA also states that on August 13, 1985, the new procurement was announced in the Commerce Business Daily (CBD) with a bid opening date of September 26. The VA contends, therefore, that since G&L did not protest until October 18, its protest is untimely and should be dismissed.

G&L responds that since its contract was renewed in 1984 without the required 30-day notice, the 30-day notice requirement was voided for this 1985 contract. G&L also argues that it never received actual or constructive notice of the solicitation. In this regard, G&L points out that the CBD notice stated a requirement for ". . . home use oxygen for beneficiaries of the VA for the VA Medical Center, Newington, CT for the period 1 Oct. 85 through 30 Sept. 85. . . ." It is G&L's contention that this CBD notice calling for a termination date of September 30, 1985, was wholly ineffective in providing notice to G&L that the subsequent year's services (85-86) were being solicited by the IFB.

With regard to the clearly obvious typographical mistake in the CBD announcement, i.e., calling for a contract period of October 1, 1985, through September 30, 1985, instead of September 30, 1986, we think that any

prudent contractor would know that a contract was being solicited for a future requirement of home use oxygen services. It was the duty of the contractor to either request a solicitation from the VA or at least inquire as to when the contract period was to run. Certainly, G&L, as incumbent contractor at the Newington VA Medical Center, should have known, despite the typographical mistake, that its interests were being directly affected by the CBD announcement. Accordingly, we find that the error in the CBD announcement did not deprive G&L of adequate notice. (Compare Morris Guralnick Associates, Inc., B-214751.2, Dec. 3, 1984, 84-2 C.P.D. ¶ 597, wherein we found that a CBD notice improperly listed under the wrong classification of the CBD was not considered adequate.)

We have held that the publication of a procurement in the CBD constitutes constructive notice of the solicitation and its contents. Detroit Broach and Machine, B-213643, Jan. 5, 1984, 84-1 C.P.D. ¶ 55. This is so even where an agency fails to send the protester a copy of the solicitation. Aurora Spectrum International, B-214162, Feb. 13, 1984, 84-1 C.P.D. ¶ 185. Although G&L argues that the VA's action in conducting this procurement and the prior renewal resulted in G&L delaying its protest, this does not excuse G&L from compliance with our bid protest timeliness requirements. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that protests based upon alleged solicitation improprieties which are apparent before bid opening date must be filed before bid opening date. These regulations provide objective criteria for application by our Office to all protests before us and may not be waived by the actions or representations of the contracting agency. Detroit Broach and Machine, B-213643, supra. Accordingly, the protest is untimely.

Moreover, even if the protest were timely, we do not find that the agency action violated the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3551, et seq. (West Supp. 1985).

We are mindful of the recent decision, The Thorson Company, General Services Board of Contract Appeals, No. 8185-P, October 30, 1985, reprinted in 85-3 B.C.A. 918,516 (CCH 1985), in which the Board held that the Competition in Contracting Act's requirement for "full and open competition" was violated when an incumbent contractor did not receive solicitation material for a follow-on contract with the procuring agency and, thus, did not submit its offer by the closing date. The Board found that the protester's late proposal was excusable. The Board's decision appears to have been based on the fact that the agency may be able to enlarge the number of participants in

the procurement process beyond a single potential contractor whose price had not yet been revealed and that no award had been made.

We have recently held that a procuring agency's failure to solicit a potential bidder, even an incumbent contractor, does not provide a compelling reason for resolicitation where there is no showing that the agency made a deliberate or conscious attempt to preclude the bidder from competing, neglected to make a significant effort to obtain adequate competition, or failed to obtain reasonable prices. Leavenworth Office Equipment, B-220905, Nov. 12, 1985, 85-2 C.P.D. ¶ 543.

Although it is unclear why the VA did not send G&L a copy of the solicitation, we do not think that G&L has shown that the VA made a deliberate or conscious attempt to preclude it from competition. Moreover, in light of the four other bids under this solicitation, the fact that award had been made before the protest was filed and since there is no showing that the VA failed to obtain reasonable prices, we find this case distinguishable from The Thorson Company case.

In regard to G&L's allegation that B-Mar is not a small business, our Office does not consider questions concerning small business size status determinations. Siska Construction Company, Inc., B-217593, June 26, 1985, 85-1 C.P.D. ¶ 724.

The protest is dismissed.

Harry R. Van Cleve

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